Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

WILLIAM FRANKLIN BAILEY,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

Petition For A Writ Of Certiorari To The Texas Court Of Criminal Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Double Jeopardy Clause of the Fifth Amendment bar the criminal prosecution of a motorist for driving while intoxicated after the administrative suspension of his driver's license for failing a breath test?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment of the Fourteenth Court of Appeals of Texas, which held that the prosecution of a motorist for DWI, following the administrative suspension of his driver's license for failing a breath test, does not violate double jeopardy.

OPINION BELOW

The unpublished opinion of the court of appeals was issued on February 15, 1996 (Appendix A). The Court of Criminal Appeals denied discretionary review on April 9, 1997 (Appendix B).

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> . . . [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . .

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

This case involves § 49.04 of the Texas Penal Code (Appendix C) and Texas Revised Civil Statute article 6687b-1 (ALR statute) (Appendix D).[1]

STATEMENT OF THE CASE

On March 23, 1995, a police officer arrested petitioner for DWI. After petitioner failed a breath test, he was formally charged with DWI.

On April 20, 1995, the Texas Department of Public Safety (DPS) suspended petitioner's driver's license for 60 days because he had failed the breath test following his arrest for DWI. Petitioner surrendered his license to the DPS from May 2 through June 30, 1995. He was required to pay a $100.00 reinstatement fee to get it back.

On August 31, 1995, petitioner filed a pretrial application for writ of habeas corpus seeking to bar prosecution for DWI on double jeopardy grounds. On September 11, 1995, the trial court held an evidentiary hearing and denied relief. Petitioner filed a pretrial appeal.

On February 15, 1996, the court of appeals affirmed the denial of relief in an unpublished opinion. On April 9,

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[1] The ALR statute was recodified, effective September 1, 1995, in Chapter 524 of the Texas Transportation Code.

1997, the Court of Criminal Appeals denied discretionary review. *Ex parte Bailey*, no. 14-95-1071-CR (Tex. App. – Houston [14th Dist] 1996, pet. ref'd).

REASONS FOR GRANTING THE WRIT

THE ADMINISTRATIVE SUSPENSION OF A MOTORIST'S DRIVER'S LICENSE FOR FAILING A BREATH TEST CONSTITUTES PUNISHMENT THAT BARS A SUBSEQUENT PROSECUTION FOR DRIVING WHILE INTOXICATED ON DOUBLE JEOPARDY GROUNDS

The Texas Court of Criminal Appeals has held that the suspension of a driver's license for 60 days and a $100.00 reinstatement fee does not constitute punishment so as to create a double jeopardy bar to prosecution of the motorist for DWI. *Ex parte Tharp*, 935 S.W.2d 157 (Tex. Crim. App. 1996). The opinion was predicated on the conclusion that an administrative license suspension constitutes a remedial civil sanction intended to protect the public rather than a criminal sanction to punish the motorist.[2]

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[2] In *United States v. Ursery*, 518 U.S. ___, 116 S.Ct. 2135, 135 L.Ed.2d 549 (1996), this Court held that an in rem civil forfeiture is essentially a remedial civil action that does not constitute punishment, and in any event, is not so punitive as to render it criminal for double jeopardy purposes. The concurring opinion in *Tharp* observed that the suspension of a driver's license does not constitute an in rem forfeiture, as in *Ursery*. *Ex parte Tharp*, 935 S.W.2d at 162, n.1 (Meyers, J., concurring). Accordingly, *Ursery* is not dispositive of the issue.

Whether "criminal" or "civil," a sanction constitutes punishment if it serves the goals of punishment – retribution and deterrence. *United States v. Halper*, 490 U.S. 435, 448 (1989). That a sanction is labeled "civil" is not dispositive for double jeopardy purposes. "Simply put, a civil as well as criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment." *Id.* see also *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. ___, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994) (sanction constitutes punishment even though designated as "tax"). In order to determine whether a sanction constitutes punishment, a "particularized assessment" must be made of "the sanction imposed and the purposes that the sanction may fairly be said to serve." *United States v. Halper*, 490 U.S. at 448. The court must look to the entire scope of the statute, its stated purpose and legislative history, and how the machinery of government actually works in the individual case. *Id.* at 447.

A. The Structure And Effect Of The ALR Statute Are Characteristic Of A Penal Statute.

In *Department of Revenue of Montana v. Kurth Ranch, supra*, this Court considered a "drug tax" that Montana imposed upon persons arrested for drug offenses. The Court held that the tax was "fairly characterized as punishment" because it was (a) more than eight times the market value of the drugs, (b) conditioned upon the commission of a crime, (c) invoked only after the taxpayer was arrested for the same conduct giving rise to the tax, and (d) levied only upon criminals.

Applying the *Kurth Ranch* analysis to petitioner's case, an administrative license suspension also is "fairly characterized as punishment." The suspension is conditioned upon the commission of a crime, as it is imposed only after the motorist has been arrested for DWI. It is levied only upon criminals, as article 6687b-1, § 5(d) nullifies and expunges the suspension if the motorist is subsequently acquitted of DWI. Motorists arrested for DWI make up the entire class of persons subject to this license suspension.

Other provisions of the ALR statute further demonstrate that it is characteristic of a penal statute. First, as noted above, the statute contains an expunction provision. If the motorist is first acquitted of DWI, the license suspension is not imposed. If the motorist is subsequently acquitted, the license suspension is expunged from his driving record. A statute that is solely remedial in nature would not contain such a provision, which counteracts the goal of removing "unsafe" drivers from the road.

Second, where the motorist's license is suspended under the ALR statute, and then suspended again following a conviction for DWI, the period of suspension imposed for failing the breath test is credited toward the period of suspension imposed for the DWI conviction "if the suspension arose from the same offense for which the court is suspending the person's license." *TEX. REV. CIV. STAT. ANN. art. 6687b-1, § 6(c) (Supp. 1994).* If the statute was solely remedial in nature, it would be counterproductive to credit the suspension toward a subsequent DWI suspension, as it would reduce the length of time that an "unsafe" driver is removed from the road. Moreover, by including the "same offense" language in the

statute, the legislature implicitly acknowledged that the statute constitutes punishment, and that a motorist convicted of DWI should not twice be punished by having his license suspended for two full suspension periods.

Finally, the period of suspension doubles if the motorist has one or more breath test refusals, and triples if he has one or more breath test failures, during the five years immediately preceding the date of his arrest. *TEX. REV. CIV. STAT. ANN. art. 6687b-1, § 6(b)(2)(3) (Supp. 1994)*. Thus, like penal statutes, the ALR statute contains an enhancement provision to punish more severely those motorists who repeatedly violate the law.

In *Austin v. United States*, 509 U.S. ___, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993), this Court found it significant that the forfeiture statute at issue contained several "innocent owner" defenses, observing, "These exemptions serve to focus the provisions on the culpability of the owner in a way that makes them look more like punishment, not less." 125 L.Ed.2d at 504. Likewise, the structure of the ALR statute demonstrates the legislature's intent to focus on the culpability of the suspected intoxicated motorist in a similar manner. Not only is the suspension period enhanced where the motorist is guilty of subsequent violations of the law, but it is more severe for refusing the breath test (90 days) than for failing it (60 days).

These three provisions – expunction, sentencing credit and enhancement – are characteristics of penal statutes. Even assuming that the ALR statute serves some remedial purposes, its structure and effect reflects that it is aimed at punishing and deterring drunk drivers.

B. The Legislative History Of The ALR Statute Demonstrates The Punitive Nature Of An Administrative License Suspension.

The legislative history of the ALR statute demonstrates that the legislators plainly intended it to be punitive. *Arnold v. State*, 920 S.W.2d 704, 714-15 (Tex. App. – Houston [1st Dist.] 1996, pet. ref'd). The primary purpose of the ALR statute is to provide swift and sure punishment to motorists arrested for DWI in order to deter the commission of that offense.

Although the ALR statute is partly remedial, its major objective is to punish and deter drunk drivers. The State cannot prevail on the double jeopardy issue simply by showing that a license suspension has some remedial effects, any more than the government could prevail in *Halper, Austin* or *Kurth Ranch* by showing that some of the fines, forfeited assets or taxes would be used to reimburse government agencies for their law enforcement costs. "A civil sanction that cannot be fairly said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment." *United States v. Halper*, 490 U.S. at 448. Thus, an administrative license suspension constitutes punishment, and should bar the subsequent prosecution of the motorist for DWI on double jeopardy grounds.

CONCLUSION

Petitioner requests that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

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D. Texas Revised Civil Statute article 6687b-1 .. App. 6

Affirmed and Opinion filed February 15, 1996.

(SEAL)

In The

Fourteenth Court of Appeals

NO. 14-95-01071-CR

EX PARTE WILLIAM FRANKLIN BAILEY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No.10
Harris County, Texas
Trial Court Cause No. 9537022

OPINION

This is an appeal from the denial of a pretrial writ of habeas corpus. We affirm.

On March 23, 1995, appellant was stopped by a police officer for suspicion of driving while intoxicated. A breathalyzer indicated that appellant had an alcohol concentration of greater than 0.10.[1] Appellant was served with notice of an administrative driver's license suspension. *See* TEX.REV.CIV.STAT.ANN. art. 6687b-1 § 2 (Vernon

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[1] A person is legally intoxicated if the person's alcohol concentration is 0.10 or more. *See* Tex. Penal Code Ann. § 49.01(2)(B) (Vernon 1994).

Supp. 1995). Appellant appealed the suspension to the State Office of Administrative Hearings (SOAH). *See id.* § 7. The SOAH administrative judge found that the officer had reasonable suspicion to make the stop and probable cause to arrest. Based on that finding, the administrative judge upheld the suspension.

Appellant was subsequently charged with driving while intoxicated. TEX. PENAL CODE ANN. § 49.04. Before trial, appellant applied for a writ of habeas corpus arguing that he would be subjected to double jeopardy if the criminal action was allowed to proceed. The trial court denied the writ. Appellant appeals the trial court's decision and contends that the continuation of the criminal prosecution would violate the Texas and Federal Constitutions. *See* U. S. CONST. amend. V; TEX. CONST. art. I § 14.

Appellant argues that he would be subjected to multiple prosecutions and multiple punishment for the same offense. *See United States v. Halper,* 490 U.S. 435, 440 (1989); *Watson v. State,* 900 S.W.2d 60 (Tex. Crim. App. 1995). In *Voisinet v. State,* 909 S.W.2d 262 (Tex. App. – Houston [14th Dist.] 1995, pet. granted), this court held that suspension of a person's driver's license in an administrative proceeding does not constitute prosecution for an offense for purposes of a defendant's protection against double jeopardy and, therefore, cannot be the same offense as driving while intoxicated.

Because appellant's arguments are incorrectly premised on the fact that the administrative license suspension and a subsequent prosecution are prosecutions for the same offense, the trial court was correct in denying the

application for writ of habeas corpus. Appellant's point of error is overruled.

The judgment of the trial court is affirmed.

PER CURIAM

Judgment rendered and Opinion filed February 15, 1996.

Panel consists of Justices Yates, Fowler and O'Neill.

Do not publish – TEX. R. APP. P. 90.

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OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITAL STATION, AUSTIN, TEXAS 78711

April 9, 1997
COA#: 14-95-01071-CR
RE: Case No.: 0374-96
STYLE: BAILEY, EX PARTE WILLIAM FRANKLIN

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

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Troy C. Bennett, Jr., Clerk

App. 4

RANDY SCHAFFER
1301 MCKINNEY
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03

§ 49.04. Driving While Intoxicated

(a) A person commits an offense if the person is intoxicated while driving or operating a motor vehicle in a public place.

(b) Except as provided by Subsection (c) and Section 49.09, an offense under this section is a Class B misdemeanor, with a minimum term of confinement of 72 hours.

(c) If it is shown on the trial of an offense under this section that at the time of the offense the person driving or operating the motor vehicle had an open container of alcohol in the person's immediate possession, the offense is a Class B misdemeanor, with a minimum term of confinement of six days.

Added by Acts 1993, 73rd Leg., ch. 900, § 1.01, eff. Sept. 1, 1994.

Dept. of Public Safety (App. 1 Dist.1983) 678 S.W.2d 88.

Art. 6687b-1. Suspension based on administration determination

Text of article effective Jan. 1, 1995

Definitions

Sec. 1. In this article:

(1) "Alcohol concentration" has the meaning assigned by Article 6701*l*-1(a), Revised Statutes.

(2) "Alcohol-related or drug-related enforcement contact" means a driver's license suspension, disqualification, or prohibition order under the laws of this state or another state following:

(A) conviction of an offense prohibiting the operation of a motor vehicle while intoxicated, while under the influence of alcohol, or while under the influence of a controlled substance;

(B) a refusal to submit to the taking of a blood or breath specimen following an arrest for an offense prohibiting the operation of a motor vehicle while intoxicated, while under the influence of alcohol, or while under the influence of a controlled substance; or

(C) an analysis of a blood or breath specimen showing an alcohol concentration of level specified in Article 6701*l*-1(a), Revised Statutes, following an arrest for an

offense prohibiting the operation of a motor vehicle while intoxicated.

(3) "Department" means the Department of Public Safety.

(4) "Director" means the director of the Department of Public Safety.

(5) "Driver's license" has the meaning assigned by Section 1, Chapter 173, Acts of the 47th Legislature, Regular Session, 1941 (Article 6687b, Vernon's Texas Civil Statutes).

(6) "Public place" has the meaning assigned by Section 1.07(a), Penal Code.

Service of notice of driver's license suspension by arresting officer

Sec. 2. (a) If a person arrested for an offense under Article 6701*l*-1, Revised Statutes, or Section 19.05(a)(2), Penal Code, submits to the taking of a specimen of breath or blood and an analysis of the specimen shows the person had an alcohol concentration of a level specified in Article 6701*l*-1(a)(2)(B), Revised Statutes, the arresting officer shall serve notice of driver's license suspension personally on the arrested person.

(b) If a person arrested for an offense under Article 6701*l*-1, Revised Statutes, or Section 19.05(a)(2), Penal Code, submits to the taking of a specimen of breath or blood and an analysis of the specimen is not returned to the arresting officer before the person is admitted to bail, released from custody, or committed to jail, the arresting

officer shall attempt to serve notice of driver's license suspension personally on the arrested person.

(c) A copy of the notice of suspension shall be sent by the officer to the department before the end of the fifth business day after the date of the arrest.

(d) The department shall develop forms for notices of suspension that shall be used by all state and local law enforcement agencies.

Arrest report

Sec. 3. (a) A peace officer who arrests a person for an offense under Article 6701*l*-1, Revised Statutes, or Section 19.05(a)(2), Penal Code, shall before the end of the fifth business day after the date of the arrest, send the department a sworn report of information relevant to the arrest, if analysis of the specimen showed an alcohol concentration of a level specified in Article 6701*l*-1(a)(2)(B), Revised Statutes. The report shall identify the arrested person, state the officer's grounds for believing the person committed the offense, give the analysis of the specimen, and include a copy of the criminal complaint filed in the case.

(b) A report required by this section shall be made on a form approved by the department and in the manner specified by the department.

Notice of driver's license suspension

Sec. 4. (a) On receipt of a report of a peace officer under this article, if the officer did not serve notice of

suspension of driver's license at the time of obtaining the results of the analysis of the blood or breath specimen, the department, in accordance with Section 5 of this article, shall make the determination and issue notice of driver's license suspension if required.

(b) In the event that the officer did not serve notice of suspension of driver's license in accordance with Section 5 of this article, the department shall mail, by certified mail, notice of suspension to the address of the person, as shown by the records of the department, and to the address given in the peace officer's report, if different. Notice is presumed received on the fifth day after the day it is mailed.

(c) A notice of suspension must clearly state the reason and statutory grounds for suspension, the defective date of suspension, the right of the person to a hearing, how to request a hearing, and the time limit within which a request for a hearing must be made. If the department does not suspend the person's driver's license, the department shall notify the person of its determination and shall rescind any notice of suspension served on the person.

Authority of department to suspend driver's license

Sec. 5. (a) The department shall suspend the driver's license of a person if it determines that the person had an alcohol concentration of a level specified in Article 6701*l*-1(a)(2)(B), Revised Statutes, while driving or operating a motor vehicle in a public place.

(b) The department may not suspend the driver's license of a person if the analysis of the person's breath or blood, submitted at the requests of a peace officer, determined that the person had an alcohol concentration of a level below that specified in Article 6701*l*-1(a)(2)(B), Revised Statutes, at the time of taking the specimen.

(c) The department shall make the determination based on the report of a peace officer submitted under Section 3 of this article. The determination is final, unless a hearing is requested under Section 7 of this article.

(d) The determination of the department is a civil matter, is independent of and is not an estoppel as to any matter in issue in an adjudication of a criminal charge arising from the occurrence that is the basis for the suspension, and does not preclude litigation of the same or similar facts in a criminal prosecution. Except as provided by this subsection, the disposition of a criminal charge does not affect a driver's license suspension under this article and is not an estoppel as to any matter in issue in a driver's license suspension proceeding under this article. Provided, that if a criminal charge under Article 6701*l*-1, Revised Statutes, or Section 19.05(a)(2), Penal Code, results in an acquittal, a suspension under this article shall not be imposed. If a suspension under this article has already been imposed, the department shall rescind the suspension and remove references to the suspension from the computerized driving record of the individual.

Effective date of suspension

Sec. 6. (a) A driver's license suspension under this article takes effect on the 40th day after the date on which:

(1) the person received notice from the officer under Section 2 of this article; or

(2) the person is presumed to have received notice of suspension from the department by mail under Section 4 of this article.

(b) a period of suspension under this article is:

(1) 60 days if the person's driving record shows no prior alcohol-related or drug-related enforcement contact during the five years immediately preceding the date of the person's arrest; or

(2) 120 days if the person's driving record shows one or more alcohol-related or drug-related enforcement contacts, as defined in Section 1(2)(B) or (C) of this article, during the five years immediately preceding the date of the person's arrest; or

(3) 180 days if the person's driving record shows one or more alcohol-related or drug-related enforcement contacts, as defined in Section 1(2)(A) of this article, during the five years immediately preceding the date of the person's arrest.

(c) If a person's driver's license is suspended under this article and the person is also convicted of an offense under Article 6701*l*-1, Revised Statutes, or Section 19.05(a)(2), Penal Code, arising out of the same occurrence, the license suspensions required by this article and

by Section 24, Chapter 173, Acts of the 47th Legislature, Regular Session, 1941 (Article 6687b, Vernon's Texas Civil Statutes), or Section 25, Texas Commercial Driver's License Act (Article 6687b-2, Revised Statutes), shall all be imposed. Provided, that the court shall credit toward the period of suspension of a person's license required by Section 24, Chapter 173, Acts of the 47th Legislature, Regular Session, 1941 (Article 6687b, Vernon's Texas Civil Statutes), or by Section 25, Texas Commercial Driver's License Act (Article 6687b-2, Revised Statutes), a period of suspension imposed under this article if the suspension arose from the same offense for which the court is suspending the person's license. The court may not extend the credit to a person who has been previously convicted of an offense under Article 6701*l*-1, Revised Statutes, or Section 19.05(a)(2), Penal Code.

Hearings

Sec. 7. (a) A person who receives notice of suspension under this article may request a hearing in writing, including facsimile transmissions, or by other manner prescribed by the department. A request must be received by the department at its headquarters in Austin not later than the 15th day after the date notice of suspension was given under Section 2 of this article or the 15th day after the date the person is presumed to have received notice by mail under Section 4 of this article. The department shall schedule the hearing. The hearing shall beheld before the effective date of the suspension. A request for a hearing stays suspension of driver's license until the date of the final decision of the administrative law judge. For the purpose of a hearing, jurisdiction is

vested in an administrative law judge employed by the chief administrative law judge of the State Office of Administrative Hearings.

(b) A hearing shall be held at a location designated by the State Office of Administrative Hearings in the county in which the person was alleged to have committed the offense for which the person was arrested or at a site designated by the State Office of Administrative Hearings no more than 75 miles from the county seat of the county of the arrest, except as provided by Subsection (c) of this section. Provided that in counties with a population of 300,000 or more according to the most recent federal census, hearings shall be held in the county of arrest, unless held as provided in Subsection (c) of this section. A hearing shall be held not less than 10 days after the date of notification to the person, unless the parties agree to waive this requirement. The State Office of Administrative Hearings shall provide for the stenographic or electronic recording of all hearings. The issue at a hearing is whether, by a preponderance of the evidence, the person had an alcohol concentration of a level specified in Article 6701*l*-1(a)(2)(B), Revised Statutes, while driving or in actual physical control of a motor vehicle in a public place, and reasonable suspicion or probable cause existed to stop or arrest the person. If the administrative law judge finds in the affirmative as to this issue, the suspension order shall be sustained. If the administrative law judge does not find in the affirmative as to this issue, the department shall reinstate any license, permit, or privilege to operate a motor vehicle and shall rescind an order prohibiting the issuance of a license or permit.

(c) With the consent of the person and the department, the administrative law judge may conduct a hearing under Subsection (b) of this section by telephone conference call.

(d) The administrative law judge may not make an affirmative finding under this section if the analysis of the person's breath or blood, submitted at the request of a peace officer, determined that the person had an alcohol concentration of a level below that specified in Article 6701*l*-1(a), Revised Statutes, at the time of taking the specimen.

(e) a person who requests a hearing and fails to appear, without just cause, waives the right to a hearing, and the department's determination is final

(f) Notwithstanding Subsection (a) of this section, if no later than five days before the date of a scheduled hearing the department has received a request for a continuance from the person who has requested a hearing, the department shall reschedule the hearing to a date no sooner than the fifth day after the date on which the department received the request for the continuance, unless otherwise agreed by both parties. A continuance under this section stays a suspension of a driver's license until the date of the final decision of the administrative law judge. A person who has requested a hearing under this article may obtain only one continuance under this subsection, unless a bona fide medical condition be shown which prevents the person from attending the hearing in which case one additional continuance may be granted for a period not to exceed 10 days.

(g) a person whose driver's license has been suspended after a hearing under this section may appeal the suspension by filing within 30 days after the date that the administrative law judge's final determination is issued a petition in a county court at law in the county where the person was arrested or, if there is no county court at law in the county, in the county court of the county. If the county judge is not a licensed attorney, the county judge shall transfer the case to a district court for the county on the motion of either party or of the judge.

(h) Except as provided by this subsection, filing an appeal petition does not stay a suspension. The filing of an appeal petition stays a suspension if the person's driver's license has not been suspended as a result of any alcohol-related or drug-related enforcement contact, as defined in Section 1, Article 6687b-1, Revised Statutes, in the five years immediately preceding the date of the person's arrest, and the person has not been convicted under Article 6701*l*-1, Revised Statutes, or Section 19.05(a)(2), Penal Code, in the 10 years immediately preceding the date of the person's arrest, regardless of whether the prior alcohol-related or drug-related contact or conviction occurred prior to the effective date of this article. A stay shall only be effective for a period of 90 days from the filing of an appeal petition, and on the expiration of that period the department shall impose the suspension previously ordered by the department. No extension of the stay or additional stay order may be granted by the department or the court. On appeal, review is on the record certified by the State Office of Administrative Hearings with no additional testimony

except as provided by Subsection (j) of this section. Review shall be based on the substantial evidence rule.

(i) A person who appeals under this section must send by certified mail a copy of the persons' petition, certified by the clerk of the court in which the petition is filed, to both the department and the State Office of Administrative Hearings at their headquarters in Austin. The department's right to appeal is limited to issues of law. There is no right to a jury trial in an appeal under this section. A district or county attorney may represent the department in an appeal.

(j) On appeal, any party may apply to the court for leave to present additional evidence, and the court, if satisfied that the additional information is material and that there were good reasons for the failure to present it in the hearing before an administrative law judge, may order that the additional evidence be taken before an administrative law judge on conditions determined by the court. An administrative law judge may modify a prior determination as to whether the person had an alcohol concentration of a level specified in Article 6701*l*-1(a), Revised Statutes, by reason of the additional evidence. The administrative law judge shall file the evidence and any modifications. A remand under this subsection does not stay the suspension of driver's license.

(k) To obtain a transcript of an administrative hearing, a party who appeals the determination must apply to the State Office of Administrative Hearings. On payment to the State Office of Administrative Hearings of a fee not to exceed the actual cost of preparing the transcript, that

agency shall promptly furnish both parties with the transcript.

(*l*) A suspension under this article may not be probated.

(m) In a proceeding under this article, the reliability of an instrument used to take or analyze a specimen of a person's breath to determine alcohol concentration and the validity of results of the analysis may be attested to by affidavit from the certified breath test technical supervisor who is responsible for maintaining and directing the operation of breath test instruments in compliance with the rules of the department. An affidavit submitted under this subsection must contain statements on the reliability of the instrument and the analytical results and on compliance with state law in the administration of the program. An affidavit of an expert witness contesting the reliability of the instrument or the results is admissible. Except as provided by Subsection (n) of this section, the affidavit may be submitted in lieu of an appearance at the hearing by the breath test operator, breath test technical supervisor, or expert witness.

(n) Notwithstanding Subsection (m) of this section, if no later than five days before the date of a scheduled hearing the department receives from the person who has requested the hearing written notice, including facsimile transmissions, requesting the presence at the hearing of the person who took the specimen of the person's breath to determine alcohol concentration, or the certified breath test technical supervisor who was responsible for maintaining and directing the operation of the breath test instrument used to analyze the specimen of the person's

breath, or both, each requested person must appear at the hearing. The department may reschedule a hearing once at least 48 hours before the time of the hearing if a person requested under this section is unavailable. In addition, the department may reschedule the hearing on a showing of good cause if the requested person is not available at the time of hearing. A suspension order may not go into effect pending a final decision of the administrative law judge as a result of a continuance granted under this subsection. If any person whose presence is timely requested under this subsection fails to appear at the hearing, without a showing of good cause, an affidavit from that witness is inadmissible.

(*o*) A person whose driver's license is suspended under this section is subject to Section 34, Chapter 173, Acts of the 47th Legislature, Regular Session, 1941 (Article 6687b, Vernon's Texas Civil Statutes).

(p) The Administrative Procedure and Texas Register Act (Article 6252-13a, Vernon's Texas Civil Statutes)[1] applies to proceedings under this article to the extent not inconsistent with this article. The State Office of Administrative Hearings shall adopt rules that may conflict with the Administrative Procedure and Texas Register Act (Article 6252-13a, Vernon's Texas Civil Statutes) as necessary to expedite the hearings process within the time limits required by this article and applicable federal funding guidelines. Notice required by this section to be given by the department may be given telephonically or by

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[1] Repealed; see, now, V.T.C.A. Government Code § 2001.001 et seq.

other electronic means, and written notice shall follow if such means are used. Notice by mail is presumed received on the fifth day after the date it is deposited with the United States Postal Service. The decision of the administrative law judge is final when issued and signed and immediately appealable without the requirement of a motion for rehearing.

Reinstatement of driver's license

Sec. 8. (a) A driver's license suspended under this article may not be reinstated and another driver's license may not be issued until the person whose driver's license has been suspended pays to the department a fee of $100 in addition to any other fee required by law.

(b) If a suspension under this article is rescinded by the department, an administrative law judge, or a court, payment of a reinstatement fee is not required.

(c) Fees paid under this section shall be deposited in the state treasury to the credit of the operator's and chauffeur's license fund and may be appropriated only to the department to administer this article and the driver's license suspension provisions of Chapter 434, Acts of the 61st Legislature, Regular Session, 1969 (Article 6701*l*-5, Vernon's Texas Civil Statutes).

Adoption of Rules

Sec. 9. The department and the State Office of Administrative Hearings shall adopt rules to administer this article.

Added by Acts 1993, 73rd Leg., ch. 886, § 1, eff. Jan. 1, 1995.